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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JACK IRVINE,

Appellant.

VS.

ANGUS Mc DOUGALL, J. A. HEALEY, GEO. M. SMITH and ROY RUTHERFORD,

Appellees.

Appeal from United States District Court, Territory of Alaska, Fourth Division.

BRIEF ON BEHALF OF APPELLANT

HARRY E. PRATT,
LOUIS K. PRATT,
Attorneys for Appellant.

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Statement of the Case.

On the 1st day of August, 1913, appellant commenced an action in the Court below, wherein he asked for a money judgment against the defendant Angus McDougall on a cause of action in favor of himself and as assignee of several other persons, and also for the foreclosure of mechanics' liens as against all of the defendants. From and including December, 1912, to April, 1913, the defendant, Angus Mc-

Dougall, employed the appellant, Jack Irvine, and James Fox, Donald Hays, John Wensel, John H. Sully, Henry Berks and Tom King, to work for him as miners on his claim known as the Pioneer Quartz Mining Claim in the Fairbanks Precinct, Territory of Alaska. Plaintiff and the other men performed work and labor for McDougall for various lengths of time and earned different sums of money and in May, 1913, not being able to collect their wages, all filed mechanic's liens, under Chapter 28, Alaska Code (1913), against the mining ground and also against McDougall's leasehold interest therein.

McDougall made default, but the other defendants filed answers making some claims based upon an attachment lien and transfers by McDougall to two of them. The trial resulted in the Court making findings sustaining the mechanic's lien of appellant, but denying the validity of the liens of the other persons named above. See printed record, p. 69-82. With reference to the second, third, fifth, sixth and seventh causes of action stated in plaintiff's amended complaint, based upon the assigned claims of James Fox, Donald Hayes, John H. Sully, Henry Berks and Tom King, the decision of the Court was controlled by what he considered the evidence showed, viz: that those men had assigned their claims for wages to the appellant, Jack Irvine, before filing their mechanics' liens. The evidence in regard to the assignment of the mechanics' liens and when it took effect is all set forth in the bill of exceptions, com-

mencing at page 40 of the printed record and is all one way without even an attempt to create a conflict. The correctness of the Court's ruling depends upon the question of law as to when an assignment takes effect, that is to say, does it take effect when signed or when delivered to the assignee?

The findings of fact signed by the Court show sums of money due to the appellant on all of the assigned claims referred to in the amended complaint, and also finds that the persons named assigned their claims for wages to the appellant, but the conclusion of law and judgment are to the effect that the plaintiff and appellant take nothing upon the causes of action based on the assigned claims, that is in causes of action numbered two, three, four, five, six and seven. The plaintiff submitted findings of fact and conclusions of law, pursuant to Section 1063, p. 445, Alaska Code (1913), but they were rejected: See p. 46-60, printed record.

Assignments of Error.

Comes now the above named plaintiff and alleges, that the findings of fact and conclusions of law and the decree entered in the above entitled case upon the 29th day of October, 1915, and the 9th day of November, 1915, respectively, are erroneous and unjust to the plaintiff, and he files with his petition on appeal, the following assignments of error upon which he will rely upon his said appeal, to-wit:

1—The Court erred in making finding of fact

number twenty-eight, which was in words and figures, as follows:

"28—That the aforesaid James Fox, Donald Hayes, John Wensel, John Sully, and Henry Berks, sold and assigned their aforesaid claims against the said defendant, Angus McDougall to the plaintiff, Jack Irvine, upon the 20th day of May, 1913 and were not the owners of their said claims at the time they filed their lien statements as above mentioned."

for the reason that said finding is contrary to the evidence adduced upon the trial of this case.

2—The Court erred in making that portion of finding of fact number twenty-nine, which was in words and figures as follows:

"29—That the aforesaid Tom King sold and assigned his said claims to the plaintiff, Jack Irvine, long after the commencement of this suit and the said Jack Irvine was not the owner and holder of said claim at the time of the commencement of this suit,"

for the reason that said portion of said finding is directly contrary to the evidence adduced at the trial of this case.

3—The Court erred in making conclusions of law number six of said conclusions of law, in words and figures as follows:

"6—That the lien claim of James Fox, Donald Hayes, John Wensel, John Sully and Henry Berks, were and are invalid, and of no effect for

the reason that said men sold and assigned their said claims upon which said liens were based, to the plaintiff, Jack Irvine, upon the 20th day of May, 1915, and said men were not the owners of said claims at the time they filed said lien statements, therefore the plaintiff is not entitled to any judgment for the amount of said assigned claims."

for the reason that said conclusion is directly contrary to the law and evidence of the case, and is not based upon any finding of fact warranted by the evidence of the case: For the further reason that said conclusion of law is contrary to the law and inconsistent with the findings of fact made by the Court in this case.

4—The Court erred in making that portion of conclusion of law, number seven, which reads as follows:

"But plaintiff was not the assignee and owner of said lien claim of Tom King nor the debts secured thereby at the time of the commencement of this suit and therefore is not entitled to any judgment thereon."

for the reason that said portion is not based upon any finding of fact which is warranted by the evidence of this case, but the same is contrary to the law and evidence in this case.

5—The Court erred in refusing to sign plaintiff's proposed findings of fact.

6—The Court erred in failing and refusing to find

that the lien claims of James Fox, Donald Hayes, John Sully, Tom King and Henry Berks set forth in the second, third, fifth, sixth and seventh causes of action of plaintiff's amended complaint, as further amended by interlineation, were good and valid mechanic's liens, and that the same had been assigned to the plaintiff after the filing of the same in the office of the Recorder of the Fairbanks Precinct, Territory of Alaska, and before the commencement of this suit.

7—The Court erred in failing and refusing to enter judgment and decree declaring the lien claims of James Fox, Donald Hayes, John Sully, Tom King and Henry Berks, set forth in the second, third, fifth, sixth and seventh causes of action respectively, good and valid liens owned by the plaintiff and ordering the same foreclosed and the property therein mentioned, sold to satisfy the sums mentioned in said causes of action.

8—The Court erred in over-ruling plaintiff's objections to findings of fact and conclusions of law, prepared consonant to the Court's decision and which said findings of fact and conclusions of law, were by the Court, signed upon the 29th day of October, 1915.

9.—The Court erred in denying plaintiff's motion for a new trial.

10—The Court erred in making that portion of its judgment and decree, which reads as follows:

"IT IS FURTHER ADJUDGED and DE-

CREED that the aforesaid assigned claims of James Fox, Donald Hayes, John Wensel, John Sully and Henry Berks, set forth in the second, third, fourth, fifth and seventh causes of action respectively, of plaintiff's amended complaint as further amended by interlineation, did not constitute valid liens and that plaintiff shall take nothing thereby."

for the reason that portion is contrary to the law and evidence in this case and not based upon any finding of fact and conclusion of law warranted by the evidence in this case.

11—The Court erred in making that portion of its judgment and decree which reads, as follows:

"IT IS FURTHER ADJUDGED and DECREED that plaintiff take nothing by virtue of the assigned claim of Tom King set forth in the sixth cause of action of plaintiff's amended complaint as further amended by interlineation."

for the reason that said portion is contrary to the law and evidence in this case and not based upon any finding of fact and conclusion of law justified by any law and evidence in this case.

12—The Court erred in failing and refusing to find that the lien claims of said James Fox, Donald Hayes, John Sully, Tom King and Henry Berks were valid first liens upon said property and superior to any right, title or lien of defendants J. A. Healy, Geo. M. Smith and Roy Rutherford and in refusing to so decree.

13—The Court erred in making and signing the judgment and decree entered herein.

WHEREFORE plaintiff prays that the judgment in the above entitled action be reversed and that the Court be ordered to make findings of fact and conclusions of law in accordance with the law and the evidence of the case, and to base a decree thereon.

HARRY E. PRATT,
LOUIS K. PRATT,
Attorneys for Appellant.

Brief and Argument.

The case hinged upon the question as to whether or not the assignment of the claims for labor and mechanics' liens (a copy of which is found at page 41 of the printed record), took effect on the day it was signed, to-wit: May 20, 1913, or whether it became effective when delivered to the plaintiff and appellant at a later date.

The facts on this subject will be found from pages 40 to 45, inclusive, of the printed record, and show conclusively that the assignors, James Fox, Donald Hayes, John Wensel, John H. Sully, Henry Berks and Tom King made out their mechanics' lien statements on that day and verified them before Harry E. Pratt, and that all of them, except Tom King, on the same day signed a written assignment of their claims and "also any and all rights which I may have by virtue of **having filed** a mechanic's lien, etc." Harry E. Pratt testified that after he had made out the me-

chanics' liens for these men, including the appellant, on the 20th day of May, 1913, he prepared the assignment, but was instructed by the assignors not to deliver the same to Mr. Irvine until after their mechanics' liens had been duly filed; that he complied with their instructions in all respects, and after the mechnics' liens had been filed and before the suit was commenced by appellant, he formally delivered the paper containing the assignment to Irvine; that up to that time the said paper had been in his possession as the agent of the assignors, with instructions when to deliver, and that he had followed the instructions. Irvine, the appellant, testified to the effect that shortly after the liens were filed and before the suit was commenced, the assignment was turned over to him. This was all the evidence there was on the subject from any source.

We insist that the assignment of the claims of those laborers to the plaintiff and appellant, did not take effect until the same was delivered to Irvine by Harry E. Pratt, which was after the liens were filed and before the suit was commenced. No doubt it is the law that if a laborer assigns his claim for wages, he cannot afterwards file a valid mechanic's lien to secure the debt, but here that rule of law was distinctly in mind and was conformed to literally. It is elementary that a written assignment or any other legal paper, does not become effective until it is delivered to the assignee or grantee and accepted. The wording of the assignment itself shows that the assignors

intended that it should take effect after the liens were

RITTER v. STEVENSON, 7 Cal. 388;

GOVIN v. DE MIRANDA, 27 N. Y. Sup. 1049;

NIXON v. JOSHUA HENDY IRON WORKS, (Ore.) 99 Pac. 11.

this was a plain error.

2 Am. & Eng. Enc. of Law, p. 1061.

In Tom King's case, which is made the subject of the sixth cause of action, no formal written assignment was made in the first instance, but only a verbal one, after which, however, and after the action was commenced, he signed the same written assignment that the other men had already executed. That a parol assignment of such a claim and the mechanic's lien based thereon is good, we cite:

McFeron vs. Donnes (Ore.) 116 Pac., p. 1063.

The findings are to the effect that the assigned claims for labor represent unpaid bills due those men and that at the time of the trial they were valid debts against defendant McDougall, were unpaid and owned by appellant, Jack Irvine, but the Court, because he held against the validity of the mechanics' liens of the assignors, refused to enter any judgment for money in favor of the plaintiff on the other causes of action set forth in his complaint. This was wholly wrong because, even though the mechanics' liens—the incident—might fail, yet his complaint stated a good cause of action for money against McDougall with

reference to these assigned claims and judgment should have been entered in appellant's favor against McDougall for the money demanded, for each of the causes of action based on the assignments.

Section 1, Lord's Code of Civil Procedure, (Ore.), reads:

"The distinction heretofore existing between forms of actions at law is abolished, and hereafter there shall be but one form of action at law for the enforcement of private rights or the redress of private wrongs."

Section 833, Alaska Code (1913), reads as follows:

"The distinction between actions at law and suits in equity and the forms of all such actions and suits are abolished and there shall be but one form of action for the enforcement of protection of private rights and the redress or prevention of private wrongs, which is denominated a civil action."

It seems evident from this that the codifiers of the Alaska Code intended to wipe out of existence all of the technical distinctions between actions at law and siuts in equity, and intended that a plaintiff might set out his facts in his complaint, whether such facts were of a legal or equitable nature or both, and might have such relief as the pleadings and proofs might warrant. The language of the Alaska Code is entirely different from that of Oregon, but is substantially the same as most of the Western States,

including Montana and California.

In Russell vs. Hayner, 130 Fed., p. 90, this Court held that where, in a suit to foreclose a mechanic's lien, the plaintiff failed to establish his lien, no judgment for money could be taken. This must have been said upon the theory that the plaintiff, having an adequate remedy at law, must go into a law Court, that is, he must commence a new action to get a judgment for the money due him, merely because, in trying to collect a debt secured by a mechonic's lien, he failed for some reason, technical or otherwise, to get a decree foreclosing his lien.

In a later case in the same Court (Madden vs Mc-

TISH v. FIRST NAT'L BANK OF SEATTLE, WASH., 150 Fed. Rep. 524;

WASKEY v. M'NAUGHT, 163 Fed. Rep. 929;

DECKER v. SUPERIOR COURT, 151 Cal., 317.

Madden vs. McKenzie overrules the case of Russell vs. Hayner, but in any event we respectfully ask the Court to re-examine this question.

The Oregon Supreme Court, in Beacannon vs. Liebe (5 Pac. Rep., p 273), said that there was no very good reason for holding to the distinction between actions at law and suits in equity, especially where the result would be that a plaintiff having a perfectly good cause of action at law stated, could not take a judgment for money, '(for example to foreclose a lien and such lien was not established at

the trial), yet they said that the practice had become so firmly intrenched in Oregon that they would have to adhere to it anyhow.

Ming Yue et al. vs. Coos Bay Ry. Co. (Ore.), 33 Pac., p. 641.

The third paragraph of Section 699, page 342, Alaska Code (1913) reads:

> "In all actions to enforce any liens created by this chapter all persons PERSONALLY LIABLE and and all lien holders whose claims have been filed for record under the provisions of Section 695, shall, and all other persons interested in the matter in controversy or in the property sought to be charged with the lien, may be made parties."

If a personal judgment may not be taken against those personally liable, where the mechanic's lien feature of the plaintiff's case fails, why does the Code require that such persons be made parties defendant? The contractor is personally liable and is a necessary party defendant, notwithstanding he has nothing whatever to do or to say, with reference to the validity of the mechanics' liens involved. Even the Supreme Court of Oregon seems to recognize that, under this section or for some other reason, a personal judgment for money may be taken in a mechanic's lien case.

Hand Mfg. Co. vs. Marks et al. (Ore.), 52 Pac., 512.

Western Plumbing Co. vs. Fried (Mont.), 81

Pac., 394.

Schindler vs. Green et al. (Calif.), 82 Pac., 631.

Wyman vs. Quayle (Wyo.), 63 Pac., 988.

13 Enc. Pldg. & Prac., p. 1037, and notes.

Respectfully submitted,

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